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IN THE

Supreme Court of the United States

LARRY DEAN DUSENBERY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF *AMICUS CURIAE* OF THE DKT LIBERTY PROJECT IN SUPPORT OF PETITIONER

JULIA M. CARPENTER *
JENNER & BLOCK, LLC
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

* Counsel of Record

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INTEREST OF *AMICUS CURIAE*[1]

Heeding the warning of Thomas Jefferson that "the natural progress of things is for liberty to yield and government to gain ground," the DKT Liberty Project was founded in 1997 to promote individual liberty against encroachment by all levels of government. It has been particularly vigilant in decrying the loss of liberties flowing from the so-called "war on drugs," not the least of which is the loss of property under the forfeiture statutes. Along with Justice Brandeis, the Liberty Project believe that it is

> immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, dissenting). Because the Liberty Project has a strong interest in protection of citizens against government overreaching, it is well-situated to provide this Court with additional insight into the issues presented in this case.

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[1] The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amicus*, its members, or counsel contributed money or services to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

When the federal government seeks to forfeit property belonging to an inmate in a federal prison, due process requires that the government give actual notice of the forfeiture. Several circumstances combine to require this result. First, the forfeiting agency stands to directly benefit financially if no notice or inadequate notice is given. This disincentive to give proper notice must be countered by the requirement of actual notice. Second, the federal government completely controls the inmate's access to mail and information, and therefore bears a greater responsibility to see that notice is actually received that it might bear in the case of a free citizen. Third, because an inmate cannot control or monitor his property as can someone who is not incarcerated, the government cannot argue it is the inmate's own duty to find out about the forfeiture. Finally, neither other litigants nor a court can provide any protection for the inmate's property rights because no other litigants are involved and because there is no judicial review of an uncontested forfeiture.

ARGUMENT

THE CIRCUMSTANCES OF THIS CASE REQUIRE ACTUAL NOTICE AS A MATTER OF DUE PROCESS.

1. Where the Government Has a Financial Interest at Stake, Extra Efforts to Protect Due Process Are Justified.

"[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit." *Harmelin v.*

Michigan, 501 U.S. 957, 978 n.9 (1991) (opinion of Scalia, J.). In forfeiture proceedings, there can be little question that the government stands to benefit – sometimes enormously – if a forfeiture goes uncontested. Indeed, figures from the Department of Justice demonstrate that the level of forfeiture continues to grow. Deposits into the Department of Justice Asset Forfeiture Fund grew from $27 million in 1985 to $338 million in 1996. (H.R. Rep. No. 105-358, at 22 (Oct. 30, 1997) (accompanying H.R. 1965)). In 1998, a total of $448.9 million was deposited into the Fund, resulting in a balance of $647.5 million in forfeitures and seizures. (Dep't of Just., Audit Report, *Assets Forfeiture Fund and Seized Asset Deposit Fund Annual Financial Statement for Fiscal Year 1998*, 6 (Sept. 1999) ("1998 Annual Report"). This governmental windfall is being shared with state and local governments specifically to encourage them to participate and assist in federal forfeitures: $171 million in 1998 and over $2 billion total since 1986. (1998 Annual Report at 60). In California alone, state and local law enforcement agencies and prosecutors' offices realized over $36 million just in 1999, and have received approximately $370 million since 1986. *Id.*

That the government has occasionally urged more forfeiture as a way of obtaining necessary monies is also no secret. A memorandum from the Attorney General's Office urged the U.S. Attorneys to increase their forfeitures to meet DOJ's annual budget target: "'We must significantly increase production to reach our budget target. . . . Failure to achieve the $470 million projection would expose the Department's forfeiture program to criticism and undermine confidence in our budget projections. Every effort must be made to increase forfeiture income during the remaining three months of [fiscal year] 1990.'" *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 56 n.2 (1993) (citing and quoting Executive Office

for the United States Dep't. of Justice, 38 U.S. Att'y. Bull. 180 (1990)).

Of course, the *deposits* represent only the property the government actually ends up keeping -- the *seizures* often include far more than that. Indeed, although the Justice Department records show a total of $487.5 million deposited in 1995 (*Civil Asset Forfeiture Reform Act: Hearings before the House Comm. on the Judiciary*, 104th Cong. 217 (July 22, 1996) (prepared statement of Stefan D. Cassella, Deputy Chief, Asset Forfeiture & Money Laundering Section, Dept. of Just.), DOJ claimed it had seized over $1.3 billion just in the first nine months of that year. *Double Jeopardy Clause – In Rem Civil Forfeiture*, 110 Harv. L. Rev. 206, 215 & n.85 (Nov. 1996) (citing Memorandum from Chief, Asset Forfeiture & Money Laundering Section, U.S.D.O.J., dated Jan. 23, 1996).

The money flowing into federal, state, and local enforcement agencies from the forfeiture process is unprecedented, and the receiving agencies are virtually uncontrolled in how they choose to spend the money. For state and local agencies, the federal money is "off budget" so there is little accountability, not even to state law controlling state forfeitures. The process is so inviting that state and local agencies regularly ask federal agencies to "adopt" forfeitures of property that arise factually through a state law violation that also happens to be a federal law violation that allows forfeiture. *Review of Federal Asset Forfeiture Program: Hearings before the Legislation and National Security Subcomm. of the House Comm. on Government Operations*, 103d Cong. 69 (June 22, 1993) (statement of Cary H. Copeland, Director and Chief Counsel, Executive Office for Asset Forfeiture, Dept. of Just.) (admitting "there are many instances where we have done that [adopted a state seizure]"). Once

"adopted," most (up to 80%) of the forfeited cash or proceeds from sale go from the federal government right back to the state or local agency which now does not need to account for it under state forfeiture law or procedures. This end run effectively allows state and local agencies to avoid state efforts to control incentives.

For example, in Missouri, the state legislature attempted to remove the bounty aspect of state forfeiture by requiring that seized assets go not to law enforcement, but directly to the Department of Education. Mo. Rev. Stat. § 513.623. Shortly afterward, the U.S. Attorney in the Western District of Missouri wrote a letter encouraging local law enforcement to file their forfeitures with the U.S. Department of Justice, rather than with the state. If they did so, the federal government would then return 80% of the seizure back to the local agency. Karen Dillon, *Lawmakers Again Hope to Tighten Up Law On Forfeitures*, Kansas City Star, Jan. 2, 1999 (available at www.kcstar. com/projects/drugforfeit/split.htm). Local police took up the U. S. Attorneys' invitation. When challenged, police argued that when they took property away from the property owners, they were not actually "seizing it," but rather were "holding" it until the federal government could "seize" it. Karen Dillon, *Police Sidestep Seizure Law, Report Says*, Kansas City Star, January 11, 2000 (available at www.kcstar. com/projects/drugforfeit/for3.htm). A joint committee of the Missouri legislature held hearings and concluded that police were simply ignoring the state law because by doing so, they could get money for their agencies. *Id.* Missouri has amended its legislation numerous time to try to force police to comply with the forfeiture laws.

The Missouri example is not unique. Indeed, there cannot be any serious question that the naked and alluring incentive of

direct financial gain can and sometimes does affect the way the government carries out the forfeiture process. Courts have repeatedly recognized not just the possibility but also the fact that the civil forfeiture proceedings regularly violate due process principles. "We continue to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes." *United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 905 (2d Cir. 1992). Or, as the Seventh Circuit recently concluded: "[T]he government's conduct in forfeiture cases leaves much to be desired." *United States v. $ 506,231 In United States Currency*, 125 F.3d 442, 454 (7th Cir. 1997). Further,

> [T]he war on drugs has brought us to the point where the government may seize . . . a citizen's property without any initial showing of cause, and put the onus on the citizen to perfectly navigate the bureaucratic labyrinth in order to liberate what is presumptively his or hers in the first place. . . . Should the citizen prove inept, the government may keep the property, without ever having to justify or explain its actions.

Muhammed v. Drug Enforcement Agency, 92 F.3d 648, 654 (8th Cir. 1996). This Court has itself recognized the great potential for abuse: "Forfeiture provisions are powerful weapons in the war on crime; like any such weapons, their impact can be devastating when used unjustly." *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 634 (1989). And members of Congress have also noted the problem: "[M]ay I suggest there are some incentives for some police organizations not to do this [comply with due process], because they share in the proceeds of the seized property. It is like the speed trap along the rural highway where the sheriff

waits for us, takes us to a magistrate, and his salary is paid out of the fines he levies against us." Cong. Rec. H4854 (June 24, 1999) (statement of Rep. Hyde). "We should not put our police officers on a bounty system." *Id.* at H4863 (statement of Rep. Frank). Although some of these problems have been addressed through forfeiture reform, *see* Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 185, 114 Stat. 202, the basic structure remains: the agencies effecting the forfeitures still remain the direct beneficiaries of that process.

2. The Circumstances of a Federal Inmate Require the Government to Provide Actual Notice of Forfeiture Proceedings.

Against this backdrop of direct government financial interest stands the question of whether an inmate in the custody of the federal government who did not receive actual notice of the proposed forfeiture of his property nevertheless obtained due process because there was some chance he might receive actual notice. In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the Court articulated what is required under the Due Process Clause: "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314. The Court further held that what process was due depended entirely on a due regard for the "practicalities and particularities of the case." *Id.* Here, the Sixth Circuit focused overmuch on what is "reasonably calculated" for a typical situation but failed to consider those practicalities and peculiarities.

This Court did not hold in *Mullane* or any other case, that due process would *never* require personal service or actual

notice. To the contrary, the Court observed that "[p]ersonal service has not in *all* circumstances been regarded as indispensable to the process due . . . ." *Id.* (emphasis added). And in *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 804 (1983), this Court stated that "actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party . . . if its name and address are reasonably ascertainable." Moreover, actual notice is exactly what due process aims at since holding a hearing is of little use if one party is actually unaware of it. *Mullane*, 339 U.S. at 314 ("This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."). And this Court has required particularly extensive efforts to provide notice when the circumstances relevant to the notice issue include the state's awareness of a party's inexperience or incompetence. *See, e.g., Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 13-15 (1978) (where notices regarding potential termination for failure to pay utility bills were sent to thousands of people of varying levels of education and intelligence, utility had a due process obligation to inform customers in detail about the opportunity for a hearing); *Covey v. Town of Somers*, 351 U.S. 141, 146-47 (1956) (due process required more than a written letter when the town officials knew the recipient was mentally incompetent to read or understand the foreclosure letter.) Similarly, special circumstances here that are known to the government require more than a mere mailing.

Five significant circumstances together required the government to provide actual notice rather than constructive notice to Mr. Dusenbery.

A. First, as noted above, the government stands to benefit directly if there are no objections to the forfeiture proceeding. This circumstance should weigh in the due process analysis. Evaluating the government's conduct according to its self-interest is hardly a novel proposition. In cases dealing with the Contract Clause, this court has recognized that "complete deference to a legislative assessment of reasonableness and necessity is not always appropriate because the State's self-interest is at stake." *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 26 (1977); *see also Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 412-13 & n.14 (1983) (noting a stricter level of scrutiny applies under the Contracts Clause when a state changes its own contractual obligations). And in *United States v. Winstar*, 518 U.S. 839, 898 (1996), this Court noted that "[t]he greater the Government's self-interest, however, the more suspect becomes the claim that its private contracting partners ought to bear the financial burden of the government's improvidence . . . ." The law of government contracts recognizes the same principle when it concludes, for example, that when the government is acting in its commercial interest, it is subject to the doctrine of equitable estoppel even though that doctrine does not apply to the government when it is acting in its sovereign capacity. *See United States v. Georgia-Pacific Co.*, 421 F.2d 92 (9th Cir. 1970).

Congress has also recognized that different considerations apply to the government's financial interest than to its sovereign interests. Thus, in bankruptcy law, although government lawsuits filed to enforce the police or regulatory power are exempted from the automatic stay provisions of the Bankruptcy Code, 11 U.S.C. § 362(b), government suits filed to claim a pecuniary interest in the debtor's property are not so exempted. *Missouri v. United States Bankruptcy Court for the*

Eastern District of Arkansas, 647 F.2d 768, 776 (8th Cir. 1981). Thus, when the government assesses or collects taxes, *Universal Life Church, Inc. v. United States*, 128 F.3d 1294 (9th Cir. 1997), claims contractual default, *Corporacion de Servicios Medicos Hospitalanos de Fajardo*, 805 F.2d 440, 445 (1st Cir. 1986), or withholds Medicare funds from debtor health care providers, *In re University Medical Center*, 973 F.2d 1065, 1075 (3d Cir. 1992), the government is acting in its pecuniary interest and is not exempted from the stay it would otherwise enjoy.

Together, these cases recognize that when the government has a pecuniary interest, that interest must be accounted for in the rules that apply to prevent the government's advantages over the governed from causing fundamental unfairness. Thus, if the agency doing the forfeiture will get more money *for itself* if no one contests the forfeiture, due process and fundamental fairness require that that agency give actual notice of the forfeiture.

B. The second significant circumstance requiring actual notice in this case is that unlike a free citizen who receives his or her mail directly from a post office employee (who not only has no interest in depriving the citizen of her mail, but who also commits a crime if he does not deliver it), the inmate receives his mail only by the good graces of the same agency that seeks the forfeiture. Thus, the inmate depends on the prison – the same prison that may benefit from a renovation if enough forfeiture funds are available[2] – to get

[2]A major component of spending from the Asset Forfeiture Fund has been prison construction. From 1985 to 1992, $540 million from the Asset Forfeiture Fund went to build or expand prisons. (*Review of Federal Asset Forfeiture Program: Hearings before the House Comm. on Government Operations*, 103d Cong. 77 (June 22, 1993) (prepared statement of Cary H. Copeland, Director, Executive Office for Asset Forfeiture, Office of the Deputy Attorney General).

the notice to him. The long-held assumptions about the mail being reliable pertain to the U.S. Postal Service, a disinterested third party whose only mission is to deliver the mail. That assumption cannot apply to the U.S. Bureau of Prisons, an interterested party whose mission is to incarcerate felons, not to deliver mail. Moreover, given that here, the Department of Justice controls both the forfeiture and the incarceration, that agency has direct access to the inmate as well as the ability to require prisons to use particular procedures designed to ensure actual notice in forfeiture cases. It is therefore not an undue burden to require that agency to provide actual notice.

C. Third, the failure of notice in this case cannot be ascribed to Mr. Dusenbery's lack of care or oversight of his property. Although constructive notice may have been historically justified by the notion that those with property had a duty to act reasonably to keep themselves apprised of proceedings that affected that property, *see Mennonite Board of Missions*, 462 U.S. at 804 (O'Connor, J., dissenting), that justification has no application here. Unlike the unpaid tax cases in which the property owners surely knew they had not paid their taxes, and thus should reasonably expect some foreclosure activity and could take steps to monitor such activity, many inmates may have no reason to believe their property will be forfeited. And even if they suspect it, they have no way to determine whether such proceedings have yet begun short of actual notice from the government. *See Houston v. Lack, Warden*, 487 U.S. 266, 270-71 (1988) (noting limitations on prisoner's ability to monitor proceedings in a court or prison authority's actions, or to take precautions to

protect interests).

Moreover, the law as to what may be forfeited and what may not is complex, especially when there are differences between state and federal law. For example, Illinois law forbids forfeiture of family farms, so a person arrested and convicted under state law might expect his family farm to remain intact. But federal prosecutors have nevertheless seized and forfeited family farms in Illinois under federal law. *Civil Asset Forfeiture Reform Act: Hearings before the House Comm. on the Judiciary*, 104th Cong. 28-29 (July 22, 1996) (statement of Mr. Steve Komie, Secretary, Illinois State Bar Ass'n). And finally, even if an inmate expected *some* property to be forfeited due to its use in connection with the crimes for which the inmate is incarcerated, the government may very well seize other property that is not, in fact, properly subject to forfeiture. But the inmate is not in a position to even know the property has been seized, much less that an administrative forfeiture has been initiated. Thus, because there is little an inmate can do to monitor his property, the notice from the government is the *only* way the inmate will have actual knowledge of forfeiture proceedings.

D. Fourth, unlike the circumstances in several of the due process decisions before this Court, this proceeding involves only Mr. Dusenbery. Like most forfeiture cases, no one else is protecting the inmate's interest. In contrast, in *Mullane*, the Court noted that notice reasonably calculated to reach some members of the class helped to safeguard the interests of all members of the class since their interests were the same and therefore the arguments of one would inure to the benefit of those who did not get actual notice. Here, the only person who could receive notice was Mr. Dusenbery. If he did not get notice, no one else would be protecting his interests.

This factor weighs in favor of actual notice.

E. Finally, there is no judicial review of the forfeiture action in the absence of a claim from an objector. Under the administrative forfeiture procedure, if Mr. Dusenbery did not get notice and file a claim, the government need only declare the property forfeited and immediately sell or dispose of it. 19 U.S.C. § 1609. No further action by the government was necessary to keep the property. In contrast, in *Mullane*, the court itself offered some measure of protection, since even if no out-of-state beneficiaries appeared, the Surrogate's Court still had to approve and enter the final decree accepting the accounting. That the final result had to be approved by an unbiased and objective court offered at least a measure of protection to those who were deprived of notice. In the administrative forfeiture at issue here, if the notice is met with silence, either intentional or otherwise, the matter automatically ended in favor of the government without any disinterested review of the government's action.

These circumstances demonstrate that the "mere mailing of a notice -- even with a required return receipt signed not by the addressee but by the institution -- does not satisfy the requirement of *Mullane* that the means of giving notice 'be such as one desirous of actually informing [the owner] might reasonably adopt.'" *Weng v. United States*, 137 F.3d 709, 715 (2d Cir. 1998); *see also, United States v. Woodall*, 12 F.3d 791 (8th Cir. 1993).

3. In Other Civil Proceedings, Mailing Simply Raises a Rebuttable Presumption of Actual Notice.

The frequent use of the mails, and the general reliability of

them has long been an accepted fact of legal practice in both state and federal courts. *See Mullane*, 339 U.S. at 319 (noting the mails are "an efficient and inexpensive means of communication" that generally may be relied upon to deliver notice where it is sent). Significantly, the Federal Rules do not allow service of a summons to occur by mail but require personal or actual service. Only after it is clear that the party has knowledge that the matter is pending is service by mail of other pleadings allowed under Rule 5. But even then, the act of mailing simply raises a rebuttable presumption that the letter was properly delivered and received. *Hagner v. United States*, 285 U.S. 427, 430 (1932); *Wisconsin ex rel. Flores v. Wisconsin*, 516 N.W.2d 362, 371 (Wisc. 1994). That presumption may not be given conclusive effect without violating the due process clause. *Godfrey v. United States*, 997 F.2d 335, 338 (7th Cir. 1993); *United States v. Bowen*, 414 F.2d 1268, 1273 (3d Cir. 1969). Thus, the presumption is rebuttable – proof of mailing the notice merely shifts the burden to the challenging party of presenting credible evidence that the notice was not received. If the intended recipient denies receiving the notice, the presumption is spent and a question of fact is raised. 997 F.2d at 339-40. The issue then becomes one of credibility for a fact-finder who must decide the contested issue of fact as to whether the notice was received or not.

Although the Federal Rules of Civil Procedures obviously provide procedures that may be beyond the constitutional minimum, it is nevertheless instructive that when anyone seeks to take another person's property in any manner *other* than civil forfeiture, personal service (actual notice) is required at some point. Indeed, if during that proceeding any other notices are required, and the intended recipient denies receiving them in the mail, the recipient has at least an opportunity to demonstrate that he or she did not receive actual notice. But when the

government seeks to take a prisoner's property party by administrative forfeiture, it argues that not only can it initiate and complete the whole forfeiture procedure even if the prisoner does not receive notice, but also that whether the prisoner actually received notice is irrelevant to due process. This complete "disregard for due process," as the Seventh Circuit noted, must not be allowed to stand.

CONCLUSION

In the circumstances presented here, where a federal inmate whose property the government seeks to forfeit for its own direct financial gain does not receive actual notice of the forfeiture proceeding, due process has been denied. The decision of the Sixth Circuit should be reversed.

Respectfully submitted,

Julia M. Carpenter*
JENNER & BLOCK, LLC
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

*Counsel of Record

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